The following States, by their respective Attorneys General, wish to join in the views expressed herein:

STATE	ATTORNEY GENERAL
Alabama	William J. Baxley
Arizona	Gary K. Nelson
Delaware	W. Laird Stabler, Jr.
Iowa	Richard C. Turner
Kentucky	Ed W. Hancock
Maine	Jon A. Lund
Michigan	Frank J. Kelley
Montana	Robert L. Woodahl
Nebraska	Clarence A. H. Meyer
Nevada	Robert List
New Mexico	David L. Norvell
North Dakota	Allen I. Olson
South Carolina	Daniel R. McLeod
Utah	Vernon B. Romney
Virgin Islands	Verne A. Hodge
West Virginia	Chauncey H. Browning, Jr.
Wyoming	Clarence A. Brimmer

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In The

Supreme Court of the United States

October Term, 1973

No. 73-786

MAJOR FRED R. ROSS and
STATE OF NORTH CAROLINA,

Petitioners

v

CLAUDE FRANKLIN MOFFITT,

Respondent

MAJOR FRED R. ROSS and
STATE OF NORTH CAROLINA,

Petitioners

v

CLAUDE F. MOFFITT,

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is reported as MOFFITT v. ROSS, 483 F. 2d 650 (4th Cir. 1973).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1). The Petition for a Writ of Certiorari was granted on January 7, 1974.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States.

QUESTION PRESENTED

WHETHER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION REQUIRE THE APPOINTMENT OF COUNSEL TO REPRESENT AN INDIGENT DEFENDANT SEEKING DISCRETIONARY REVIEW OF CONVICTIONS AFFIRMED ON APPEALS WHICH WERE TAKEN AS OF RIGHT.

STATEMENT OF THE CASE

No. 72-2480
(Mecklenburg County Conviction)

At the May 11, 1970 Schedule "B" Criminal Session of the Mecklenburg County (North Carolina) Superior Court, Moffitt, while represented by William D. McNaull, Jr., Esquire, court-appointed counsel[1], was convicted of forgery and uttering a forged instrument. On appeal to the North Carolina Court of Appeals[2], while still represented by William D. McNaull, Jr., Esquire, court-appointed counsel, Moffitt's conviction was affirmed on November 18, 1970. STATE v. MOFFITT, 9 N.C. App. 694, 177 S.E. 2d 234 (1970). In a letter to Moffitt, Mr. McNaull stated that he had "approached" the Superior Court for appointment to appeal "from the North Carolina Court of

1. N.C.G.S. 7A-451 reads in relevant part:
"(a) An indigent person is entitled to services of counsel on the following actions and proceedings:
"(1) Any felony case . . ."

2. N.C.G.S. 7A-27 reads in relevant part:
"Appeals of right from the courts of the trial divisions. —
"(b) From any final judgment of a superior court, other than one described in (a) of this section, or one entered in a post-conviction hearing under Article 22 of Chapter 15, including any final judgment entered upon review of a decision of an administrative agency, *appeal lies of right to the Court of Appeals.*" (Emphasis added.)

Appeals to the Supreme Court of North Carolina." In his letter[3], Mr. McNaull suggested that Moffitt —

> ". . . immediately proceed with filing your petitions for habeas corpus in the Federal Court. You might also file one in the Mecklenburg Superior Court alleging the State must appoint a lawyer for you to take your appeal from the Court of Appeals to the Supreme Court.
>
> "I would ordinarily be happy to prepare these petitions for writs for you, however, I will await hearing from you . . ."

On December 11, 1970, Moffitt filed an extensive Petition for post conviction review pursuant to N.C.G.S. 15-217, et seq., *Review of Criminal Trials*, in the Mecklenburg County Superior Court contending that the indictment on which he was tried was invalid. This Petition was denied by Order filed December 17, 1970. Moffitt then filed a "Petition for Appointment of Counsel" in the United States District Court which was denied by Order dated February 9, 1971. On February 26, 1971, Moffitt then filed an Application for Writ of Habeas Corpus. MOFFITT v. ROSS, Civil No. 2842—Charlotte (W. D.N.C.). By Order filed September 17, 1971, habeas relief was denied and Moffitt appealed. The appeal to the Fourth Circuit Court of Appeals was dismissed by Stipulation so that Moffitt could exhaust state court remedies. On April 25, 1972, Moffitt filed his third Petition for post conviction review. In the first he alleged that the Bill of Indictment upon which he was tried was fatally defective, a contention which he had unsuccessfully argued upon his appeal to the North Carolina Court of Appeals. In the second, which was denied by Order of the Mecklenburg

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3. See p. 36A, Appendix to Moffitt's Brief filed in the Fourth Circuit Court of Appeals. The letter is of further interest, since in it counsel advises Moffitt that in light of the affirmance of his conviction, counsel had "conferred with the Solicitor of Mecklenburg County and I was successful in getting *all charges against you dropped*. Hence, the only charges pending against you at the present time are the convictions for which you are now serving time." (Emphasis in original.)

County Superior Court on November 26, 1971, he alleged that his constitutional rights were violated because the North Carolina Court of Appeals, in accordance with its rules, heard and decided his case upon a narrative of the testimony at the trial instead of the trial transcript itself.[4] In the third Petition filed April 25, 1972, he alleged that his statutory and constitutional rights were violated because the trial court refused to appoint counsel to seek a Petition for Writ of Certiorari on his behalf from the Supreme Court of North Carolina after the North Carolina Court of Appeals had affirmed his conviction. By Order dated April 28, 1972, the Petition filed April 25, 1972 was denied. Moffitt then sought certiorari from the North Carolina Court of Appeals to review the Order of April 28, 1972, and by Order dated May 2, 1972, Hugh B. Campbell, Jr., Esquire, was court-appointed to represent Moffitt in seeking certiorari in the North Carolina Court of Appeals.[5] On June 26, 1972, Moffitt's court-appointed counsel filed a Petition for Writ of Certiorari which was denied by the North Carolina Court of Appeals in Conference by Order dated July 17, 1972. MOFFITT v. STATE, No. 72SC215PC. On August 25, 1972, Moffitt once again filed an Application for Writ of Habeas Corpus which was denied by Order of the District Court on November 29, 1972. MOFFITT v. ROSS, Civil No. C-C-72-193 (W.D.N.C.). (A. p. 9). From the denial of all but one claim by the District Court, Moffitt appealed to the Fourth Circuit Court of Appeals which held that ". . . The

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4. Rule 19(d), Court of Appeals Rules, Replacement Vol. 4A of the General Statutes of North Carolina.

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5. N.C.G.S. 7A-451 reads in pertinent part:
"(a) An indigent person is entitled to services of counsel in the following actions and proceedings:
"(3) A post-conviction proceeding under Chapter 15 of the General Statutes."

* * *

N.C.G.S. 15-222 reads in relevant part:
"Review by application for certiorari.—Any final judgment entered upon such a petition and proceeding may be reviewed by the Court of Appeals of North Carolina upon application by the petitioner or by the State for writ of certiorari brought within 60 days from the entry of the judgment in such proceeding."

same concepts of fairness and equality, which require counsel in a first appeal of right, require counsel in other and subsequent discretionary appeals."

No. 72-1720
(Guilford County Conviction)

At the October 30, 1970 Criminal Session of the Guilford County (North Carolina) Superior Court, Claude Franklin Moffitt, while represented by R. D. Douglas, III, Esquire, Assistant Public Defender of the Eighteenth Judicial District of the State of North Carolina[6], was tried and convicted of forgery and uttering a forged instrument.

On appeal as of right to the North Carolina Court of Appeals[7] while still represented by Assistant Public Defender Douglas, the conviction was affirmed, STATE v. MOFFITT, 11 N.C. App. 337, 181 S.E. 2d 184 (1971), and the Supreme Court of North Carolina denied a Petition for Writ of Certiorari filed on Moffitt's behalf by the Public Defender.[8] STATE v. MOFFITT, 279 N.C. 396, 183 S.E. 2d 247 (1971).

On December 10, 1971, Moffitt filed a paperwriting dated December 8, 1971, which he entitled "Motion for Employment

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6. See n. 1, supra. See, also, Article 37 of Chapter 7A of the General Statutes of North Carolina, N.C.G.S. 7A-465, et seq., *The Public Defender*.

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7. See n. 2, supra.

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8. N.C.G.S. 7A-30 reads in relevant part:

"Appeals of right from certain decisions of the Court of Appeals.—Except as provided in § 7A-28, from any decision of the Court of Appeals rendered in a case

"(1) Which directly involves a substantial question arising under the Constitution of the United States or of this State, or

"(2) In which there is a dissent . . ."

* * *

In STATE v. MOFFITT, 279 N.C. 396, 183 S.E. 2d 247 (1971), the Supreme Court of North Carolina dismissed the appeal. "For lack of a substantial constitutional question"

of Counsel" "to seek an appeal in the federal courts."[9] On January 25, 1972, Moffitt filed a Petition for post conviction review alleging the denial of counsel to perfect an appeal to the Supreme Court of the United States. This Petition was denied by Order filed February 25, 1972. After denial of the Petition, Moffitt then filed a Petition for Writ of Certiorari in the North Carolina Court of Appeals on March 10, 1972, in which he contended that the refusal of the court to appoint counsel denied him "access to the Court of Appeals for the United States." This Petition for Writ of Certiorari was denied by the North Carolina Court of Appeals in Conference on March 27, 1972. Moffitt then filed an Application for Federal Habeas Corpus on April 11, 1972, which was denied on May 19, 1972. MOFFITT v. ROSS, No. C-101-G-72 (M.D.N.C., May 19, 1972) (A. p. 7). Upon Moffitt's appeal to the United States Court of Appeals for the Fourth Circuit, it was held that he had a ". . . right to assistance of counsel in seeking access to the Supreme Court of the United States . . ." and the District Court was directed, upon remand, to ". . . appraise the substantiality of the federal claim . . ." in circumstances ". . . where the only remedy available to the District Court would be the prisoner's release on a writ of habeas corpus . . ." MOFFITT v. ROSS, 483 F. 2d 650, 655 (4th Cir. 1973).

ARGUMENT

I

AN INDIGENT DEFENDANT IS NOT ENTITLED AS A MATTER OF CONSTITUTIONAL RIGHT TO THE ASSISTANCE OF COUNSEL TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA FROM THE NORTH CAROLINA COURT OF APPEALS.

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9. By letter dated December 14, 1971, the Honorable Charles T. Kivett, Resident Judge of the Guilford County Superior Court, advised Moffitt that "this Court does not have jurisdiction to appoint you an attorney to represent you in a further hearing in the federal court. I would advise you to contact the Middle District Court here in Greensboro and ask appointment of counsel through that Court."

The appellate court system of the State of North Carolina is the Appellate Division of the General Court of Justice which consists of the Supreme Court and the Court of Appeals.[10] The Supreme Court of North Carolina has original appellate jurisdiction in any criminal matter in which the defendant has been sentenced to death or life imprisonment.[11] All other criminal appeals are taken of right from the Superior Courts of North Carolina to the Court of Appeals.[12] An appeal of right exists from the Court of Appeals to the Supreme Court of North Carolina only when it "involves a substantial question arising under the Constitution of the United States or of this State" or when "there is a dissent."[13] All other cases are subject to discretionary review by the Supreme Court of North Carolina.[14]

Moffitt had court-appointed counsel at his trials in the Mecklenburg and Guilford County Superior Courts, and in each instance counsel was reappointed upon Moffitt's appeals to the North Carolina Court of Appeals, thereby fully satisfying the requirements of DOUGLAS v. CALIFORNIA, 372 U.S. 353 (1963). In DOUGLAS this Court only went so far as to say that an indigent defendant is entitled to counsel where an

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10. N.C.G.S. 7A-5.

11. N.C.G.S. 7A-27(a).

12. N.C.G.S. 7A-27(b); n. 2, supra.

13. N.C.G.S. 7A-30; n. 8, supra.

14. N.C.G.S. 7A-31 provides in pertinent part:

"(c) In causes subject to certification under subsection (a) of this section, certification may be made by the Supreme Court after determination of the cause by the Court of Appeals when in the opinion of the Supreme Court

"(1) The subject matter of the appeal has significant public interest, or

"(2) The cause involves legal principles of major significance to the jurisprudence of the state, or

"(3) The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court."

appeal in a criminal case is a matter of right. As Mr. Justice Douglas stated in delivering the opinion of this Court:

> "We are not here concerned with problems that might arise on the denial of counsel for the preparation of a petition for discretionary or mandatory review beyond the stage in the appellate process at which the claims have once been presented by a lawyer and passed upon by an appellate court. *We are dealing only with a first appeal, granted as a matter of right to rich and poor alike . . . from a criminal conviction.* We need not now decide whether California would have to provide counsel for an indigent seeking a discretionary hearing from the California Supreme Court after the District Court of Appeals had sustained his conviction . . . or whether counsel must be appointed for an indigent seeking review of an appellate affirmance of his conviction in this Court by appeal as of right or by petition for writ of certiorari which lies within the Court's discretion. But it is appropriate to observe that a State can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an 'invidious discrimination.' . . . Absolute equality is not required; lines can be and are drawn and we often sustain them . . . But where the merits of *the one and only appeal* an indigent has of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." (Emphasis added.) DOUGLAS v. CALIFORNIA, supra, at 356, 357.

Where, as in North Carolina, further appellate review by the Supreme Court of North Carolina of the decisions of the North Carolina Court of Appeals is discretionary, there is not, as yet, a constitutional right to appeal. Moreover, application of the standards regulating discretionary review by the Supreme Court of North Carolina clearly demonstrate that Moffitt's Petition for Certiorari in the Mecklenburg County case would

have almost certainly been denied.[15] The only appeals of right to the Supreme Court of North Carolina are those specified in N.C.G.S. 7A-30.[16] All other review is discretionary. Therefore, since the Writ of Certiorari in the Supreme Court of North Carolina is a form of discretionary review, had after appeal as of right to the North Carolina Court of Appeals, there is no constitutional right to counsel to seek discretionary review from the Supreme Court of North Carolina.

In reliance upon principles which it found implicit in DOUGLAS, ". . . to require the result we reach . . .", the Fourth Circuit Court of Appeals extended the constitutional right to counsel beyond the appeal of right, to ". . . require counsel in other and subsequent discretionary appeals." 483 F. 2d at 655. While acknowledging that "Two Courts of Appeals have held that the questions reserved in DOUGLAS should be answered in the negative . . .", the Fourth Circuit ". . . notice[d] the possible impact of changing times . . ." and based its newly announced constitutional principle upon the assertion that ". . . As our resources grow, there is a correlative growth in our ability to implement basic notions of fairness. . . ." Therefore, the Fourth Circuit Court of Appeals found implicit in DOUGLAS, which now requires counsel in the first appeal of right, to also ". . . require counsel in other and subsequent discretionary appeals."

In its conclusion that the appointment of counsel is constitutionally required in discretionary review, the Circuit Court departed from the rationale upon which the constitutional

15. In STATE v. MOFFITT, 9 N.C. App. 694, 177 S.E. 2d 234 (1970), Moffitt assigned as error that (1) the Bill of Indictment upon which he was tried was defective; that (2) testimony concerning possession of a checkwriting machine was improperly admitted into evidence; that (3) the checkwriting machine was improperly admitted in evidence; and that (4) the forged instrument was improperly admitted into evidence. He also assigned as error a portion of the trial court's charge to the jury and the court's failure to grant his motions for nonsuit.

16. See n. 8, supra.

imperative for the appointment of counsel is based. As Mr. Justice Stewart explained in KIRBY v. ILLINOIS, 406 U.S. 682, 690:

> "The rationale of those cases was that an accused is entitled to counsel at any 'critical stage of the prosecution.'"

In KIRBY this Court held that the appointment of counsel is not required at a pre-indictment lineup, finding that the pre-indictment lineup is not a "critical stage." Similarly, in SIMMONS v. UNITED STATES, 390 U.S. 377 (1968), this Court held that there is no constitutional requirement of counsel at a photographic lineup, again holding that this is not a "critical stage of the prosecution." Therefore, before the accused is entitled to counsel, it must be a "critical stage of the prosecution." By requiring the appointment of counsel "in other and subsequent discretionary appeals", the Fourth Circuit Court of Appeals declared *sub silentio* that certiorari review is a "critical stage of the prosecution." However, certiorari review is obviously not a "critical stage of the prosecution", since discretionary review certainly cannot be encompassed within the "critical stage" concept. Without a "critical stage" foundation, the underpinnings of the right to counsel collapses.

When the identical contention was presented to the Seventh Circuit Court of Appeals in PENNINGTON v. PATE, 409 F. 2d 757 (7th Cir. 1969), cert. denied, 396 U.S. 1042 (1970), it was held that the State of Illinois had fully discharged its constitutional obligations by providing assigned counsel for an indigent's appeal to the intermediate appellate court and it was not required to provide counsel to assist the indigent as he sought access to the Supreme Court of Illinois.

II.

AN INDIGENT DEFENDANT IS NOT ENTITLED AS A MATTER OF CONSTITUTIONAL RIGHT TO

THE ASSISTANCE OF COUNSEL TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FROM THE SUPREME COURT OF NORTH CAROLINA.

Since Moffitt was provided legal counsel at his trials and upon his appeals to the North Carolina Court of Appeals, the requirement set forth in DOUGLAS was fully satisfied. The provision for counsel for an indigent defendant seeking a writ of certiorari from this Honorable Court is not required by any decision of this Court. BRIDWELL v. COINER, 322 F. Supp. 59 (N.D. W.Va. 1971).

In PENNINGTON v. PATE, supra, the Seventh Circuit Court of Appeals was also presented with this contention. In denying relief, the Circuit Court noted that, ". . . If we were to hold for the Petitioner here, we would be saying a fortiori that the Supreme Court's present practice of not granting counsel for the purpose of preparing certiorari petitions is contrary to equal protection under the Constitution. This we are unwilling to do." PENNINGTON v. PATE, supra, at 760.

In a similar finding the Tenth Circuit Court of Appeals held in PETERS v. COX, 341 F. 2d 575 (10th Cir. 1965), that New Mexico had no obligation to provide an indigent defendant with the assistance of counsel to prepare and file a Petition for Writ of Certiorari in this Honorable Court to the Supreme Court of New Mexico. In PETERS, a per curiam decision, the Court stated:

> "It is, of course, the law that the due process clause of the Fourteenth Amendment to the Constitution requires the appointment of counsel to represent an indigent defendant in a state criminal trial . . . It is also the law that under the due process and equal protection clauses of the Fourteenth Amendment, an indigent defendant has the right to appointed counsel on appeal of a state criminal convic-

> tion . . . But, we have been cited to no authority requiring, or even permitting, a state supreme court to appoint counsel for an indigent defendant to represent him on his appeal to the Supreme Court of the United States. Our own research has revealed none . . ."

This Court's certiorari practice has been described in STERN & GRESSMAN, *Supreme Court Practice* (4th Ed. 1969), as follows:

> "*No appointment of counsel before grant of review.* The Court has steadfastly refused to appoint counsel to assist an unrepresented indigent, prior to the grant of review, in preparing a petition for certiorari or jurisdictional statement or any other preliminary motion or document. Requests for counsel at such early stages have uniformly been rejected through the Clerk, acting on instructions from the Court. While the correctness and indeed the constitutionality of this refusal to appoint counsel to prepare the documents at this critical stage of Supreme Court litigation has been questioned at least with respect to the direct review of criminal prosecutions, there is no indication as yet that the Court will change its policy in this respect." (Id. at 378; fn. omitted.)

Having concluded that both PENNINGTON and PETERS are outdated within the context of what is now "constitutionally requisite", the Fourth Circuit held that there is also a ". . . right to assistance of counsel in seeking access to the Supreme Court of the United States . . ." 483 F. 2d at 655. Once again, it must follow that the Circuit Court *sub silentio* held that a petition for certiorari to this Honorable Court is a "critical stage of the prosecution", even though, in the Guilford County case, No. 72-2480, Moffitt was represented by the Public Defender at his trial, upon his appeal as of right to the North Carolina Court of Appeals[17], as well as upon his Petition for

17. STATE v. MOFFITT, 11 N.C. App. 337, 181 S.E. 2d 184 (1971).

Writ of Certiorari to the Supreme Court of North Carolina.[18] Yet nowhere in the caselaw has discretionary review by petition for writ of certiorari ever been characterized as a "critical stage of the prosecution."

III.

THE DECISION BELOW RAISES SERIOUS PROBLEMS AFFECTING THE STRUCTURE OF CRIMINAL JUSTICE.

The Fourth Circuit's Opinion erroneously interprets this Court's opinion in DOUGLAS, supra, "... to require the result we reach ..." and therefore the Court below found that "... the only remedy available to the District Court would be the Petitioner's release on a writ of habeas corpus ..." 483 F. 2d at 655.

Moffitt, together with the vast majority of all inmates serving State Court sentences, have been provided with court-appointed counsel at every stage of the proceeding at which counsel is constitutionally required under either GIDEON v. WAINWRIGHT, 372 U.S. 335 (1963), or DOUGLAS v. CALIFORNIA, supra. The decision of the Fourth Circuit Court of Appeals in MOFFITT established a constitutional right to court-appointed counsel for indigent defendants in situations in which this Court, and all other courts considering the issue, have found no such right to exist. Moffitt was provided with counsel at every stage of the proceedings at which the developed caselaw required the appointment of counsel. We are now confronted with a landmark holding going well beyond the requirement of counsel for critical stages or the appeal as of right, to the level of discretionary review applicable to multi-tiered appellate systems, in which the second review is discretionary and sought by petition for writ of certiorari. Going

18. STATE v. MOFFITT, 279 N.C. 396, 183 S.E. 2d 247 (1971).

beyond the second tier in a multi-tiered jurisdiction, or beyond the appeal as of right in a single-tiered system, the Fourth Circuit Court of Appeals announced in MOFFITT a new constitutional principle, i.e., the constitutional right to counsel of an indigent defendant seeking discretionary review from this Honorable Court by writ of certiorari from the highest court of a state, or by analogy, from a federal conviction upheld by a circuit court. And, according to the Circuit Court, if counsel has not been appointed to seek the discretionary review, the indigent defendant's rights have been violated and he is entitled to a writ of habeas corpus. The impact of this decision is obvious upon both state and federal court convictions, since this Honorable Court has never suggested a holding as sweeping in its scope as the Fourth Circuit's holding in this case—in fact, all opinions of this Court and of all other circuits considering this contention support a conclusion contrary to that reached by the Fourth Circuit.

North Carolina does not automatically appoint counsel as a matter of right to petition the Supreme Court of North Carolina after the North Carolina Court of Appeals has affirmed a criminal conviction.[19] The inmate may request the appointment of counsel to petition the Supreme Court for a writ of certiorari, he may file a pro se petition, or he may file a fill in the blanks petition on a printed certiorari form currently utilized by the inmates of the North Carolina Department of Correction.[20] The Public Defenders in the three experimental

19. For example, according to data supplied by the Clerk of the North Carolina Court of Appeals, in 1971 that Court heard and determined 333 criminal appeals; 413 in 1972 and 418 in 1973.

20. For example, according to data supplied by the Clerk of the Supreme Court of North Carolina, in 1971 there were 73 Petitions for Writs of Certiorari in criminal cases, of which 47, or 64.4%, were indigent; in 1972 there were 153 Petitions for Writs of Certiorari in criminal cases, of which 99 were indigent cases; and in 1973 there were 149 Petitions for Writs of Certiorari in criminal cases, of which 100 were filed in indigent cases. Of the 132 Opinions filed in 1971 by the Supreme Court of North Carolina in criminal cases, 105 or 79.9% were indigent cases. In 1972, 82, or 80% of the 102 criminal cases in which opinions were filed by the Supreme Court of North Carolina, were indigent cases. In 1973, 70 out of the 95 cases in which written opinions were filed, were indigent cases.

North Carolina counties in which Public Defender Systems have been established regard themselves as authorized to represent their clients without further court appointment on petitions for certiorari to the Supreme Court of North Carolina and to this Honorable Court. However, the Public Defender makes the determination whether to file for discretionary review based on his opinion of the merits. As a matter of practice, the Public Defender will not file a petition he regards as pointless solely because his client has requested it.

The Circuit Court's opinion in MOFFITT is contrary to PENNINGTON, a decision of the Seventh Circuit Court of Appeals issued not in the dark ages as the Fourth Circuit implies, but in 1969. The assumption that legal counsel can now be required on discretionary appeal because of increased legal resources (483 F. 2d at 655) is unsupported by any statistical justification. There has not been an enormous growth in legal resources and undoubtedly the Circuit Court would concede that the Federal Courts themselves, including this Honorable Court, lack sufficient legal resources to handle their existing caseload.

The decision of the Fourth Circuit rests analytically upon the premise that every accused must have an attorney on every occasion that a wealthy man might hire one. This principle may be desirable in the abstract, but it carries too far, not only to habeas corpus and to all civil suits, but to real estate closings as well.

The Fourth Circuit states:

> ". . . in the context of constitutional questions arising in criminal prosecutions, permissive review in the state's highest court may be predictably the most meaningful review the conviction will receive." 483 F. 2d at 653.

It is clear that at least in North Carolina that review of

constitutional claims is clearly within the power of the Supreme Court of North Carolina which repeatedly resolves such questions.

The Fourth Circuit asserts that:

> "... A defendant with adequate resources to engage counsel has a meaningful right to seek access to the state's highest court. An indigent should be afforded counsel to give him a comparably meaningful right. Deprived of it, it is of little comfort to him that he was afforded legal guidance in an appeal to a subordinate court. Denied the assistance of a competent lawyer, the quality of justice for the indigent has been substantially impaired in comparison with the quality of justice afforded his more affluent brothers." 483 F. 2d at 653.

Yet, this assertion fails to support the Court's later statement that:

> "... [I]t is a relatively minor burden we would impose on the Bar by this decision. Once a lawyer has handled one appeal, and is thoroughly familiar with the case, the issues, and the authorities, it is a relatively simple and easy task for him to prepare and file a petition for further discretionary review in a higher appellate court. That is all that is involved in these cases, for the prevailing practice of second tier appellate courts, having a discretionary jurisdiction, has been to appoint counsel for indigents once certiorari has been granted." 483 F. 2d at 655.

If all that is required is a rehash of appellate court arguments, then the litigant may simply adopt his prior brief. Accepting the premise of the opinion, the most that can be required of a state is that (1) it allow a prisoner to seek leave to appeal by filing his first appeal brief along with a copy of the lower court's opinion and (2) that the defendant whose

conviction is affirmed be notified of this fact and of applicable time limits.

Finally, the requirement that the state pay the cost of counsel on certiorari to this Honorable Court is totally without precedent. If the federal courts desire that counsel be appointed for litigation in the federal courts, then this is the obligation of the federal government. There are situations in which courts may order one party to pay the other party's attorneys fees, but such powers are exercised on an *ad hoc* basis, and then quite sparingly. There is no other example in federal practice in which an entire class of litigants is entitled in all cases to attorneys regardless of the merits of their claims and the conduct of the opposing party.

CONCLUSION

The decision of the Fourth Circuit Court of Appeals in this case extends well beyond any announced intent of this Court. It holds the promise of converting multi-tiered appellate systems, designed to alleviate court congestion, into mere stepping stones from the lower state appellate courts to the highest, and from the highest state courts to this Court, which ultimately would be required to review every conviction affirmed in the state appellate courts.

The decision of the Fourth Circuit in the application of the DOUGLAS doctrine in this case extends well beyond the intent of this Court. It is clear that this Court's holding in DOUGLAS did not envision the conclusion reached in the case at Bar. The right to counsel to seek discretionary review is not the situation to which the holding in DOUGLAS applies.

For the foregoing reasons, we respectfully submit that this case should be reversed and remanded to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-786

MAJOR FRED R. ROSS AND STATE OF NORTH CAROLINA,

Appellant,

vs.

CLAUDE FRANKLIN MOFFITT,

Appellee.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICUS CURIAE

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CLAUDE FRANKLIN MOFFITT,

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On Writ Of Certiorari To The United States Court
Of Appeals For The Fourth Circuit

BRIEF OF THE
NATIONAL LEGAL AID AND DEFENDER ASSOCIATION
AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The National Legal Aid and Defender Association is an organization composed of over 1,000 legal services and defender offices in the United States. Founded in 1911, it includes over 4,000 individual and professional members whose main concern is the extension of quality legal services to the poor.

NLADA is alarmed at the prospect that, at this late day, the right of the poor to have equal access to the Courts of our land along with the rich is being challenged. NLADA, which has filed Amicus Briefs to this honorable Court in the cases of *In re Gault, Argersinger* v. *Hamlin, Mempha* v. *Rhay,* and others dealing with the issues of right to counsel and access to the Courts for the indigent defendant, takes the position that the poor as well as the rich shall be able to file writs in the High Courts of our land.

This Brief is filed pursuant to Supreme Court Rule 42(2). The written consent of counsel for the parties has been obtained and is attached hereto.

OPINION BELOW

The decision of the Court of Appeals for the 4th Circuit is reported at 483 F. 2nd 650 (4th Cir. 1973).

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

A petition for writ of certiorari was filed in this Court on November 15, 1973, and was granted on January 7, 1974.

QUESTION PRESENTED

Whether the Sixth Amendment and the due process and equal protection clauses of the Fourteenth Amendment require the State of North Carolina to furnish assistance of counsel to indigent defendants to petition the Supreme Court of North Carolina for a writ of certiorari to review a decision of the North Carolina Court of Appeals, and to petition the United States Supreme Court for a writ of certiorari to review a decision of the North Carolina Supreme Court.

STATEMENT OF THE CASE

Amicus adopts petitioner's statement of the case.

ARGUMENT

I.

FAILURE TO APPOINT COUNSEL FOR AN INDIGENT WHO SEEKS REVIEW TO THE STATE SUPREME COURT OR THE UNITED STATES SUPREME COURT WOULD CONSTITUTE A DENIAL OF EQUAL PROTECTION OF THE LAWS, DUE PROCESS, AND THE RIGHT TO COUNSEL GUARANTEED UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In his dissenting opinion in *Douglas* v. *California*, Justice Harlan pointed out that,

> "Surely, it cannot be contended that the requirements of fair procedure are exhausted once an indigent has been given one appellate review." 372 U.S. at 366 (1963)

That is the issue at bar today. In *Douglas* v. *California*, supra, the issue before the Court involved a case where an indigent defendant was denied counsel at his first appeal. In the instant case, an indigent is denied counsel to proceed beyond that first appeal and is effectively denied access to the State Supreme Court and the United States Supreme Court on petition for certiorari. That precise issue with respect to appointment of counsel in a state Supreme Court was recently considered by the Sixth Circuit in *Mitchell* v. *Warden*, No. 72-1481, decided December, 1973.

In that case the Michigan Supreme Court had failed to appoint counsel for an indigent convicted of robbery who sought to file an application for leave to appeal to

the Michigan Supreme Court after his conviction was affirmed by the Michigan Court of Appeals. The Sixth Circuit held that the "Constitutional principles enunciated in *Griffin*, *Burns*, and *Douglas* require appointment of counsel to assist indigent appellants in applications to the Michigan Supreme Court for discretionary review."

The Court in *Mitchell* v. *Warden* first analyzed this Honorable Court's holding in *Douglas* v. *California*, supra. While recognizing that, limited to its facts, *Douglas* provided only that counsel be appointed for appeals as a matter of right, the Sixth Circuit went on to examine the underlying principle behind the decision. It focused on that portion of the opinion in *Douglas* which pointed out that the invidious discrimination complained of at bar was not between good cases and bad cases, but between rich defendants and poor ones.

> "There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf . . ." *Douglas* v. *California*, supra.

The Sixth Circuit then pointed out that the disadvantage to an accused in a discretionary appeal is no less substantial.

> "The assistance of a skilled advocate who understands the intricate and subtle factors that might persuade a court to exercise its discretionary review and who possesses the power to communicate them succinctly and cogently appears to be as important here as is the assistance of counsel at trial or on a first appeal." *Mitchell* v. *Warden*, supra, Op. p. 4.

Having concluded that the assistance of counsel was just as important to a defendant on application for leave to appeal as it was on the first appeal, the Court went on to cite *Burns* v. *Ohio*, 360 U.S. 252, for the proposition that, consistent with the doctrine of equal protection of the laws, a state may not foreclose access to the second phase of an appellate procedure where it has afforded an indigent access to the first phase, solely due to indigency.

In that case, this Honorable Court struck down the requirement for a filing fee which denied indigent litigants access to the second stage of appellate review, solely because of indigency. The Sixth Circuit held the *Burns* case dispositive of the issue of appointment of counsel at the second stage of review on the theory that denial of counsel at that stage due to indigency is equivalent to denial of effective access to the courts, and that it is no different than denying a defendant access to the Courts by requiring a filing fee before he may proceed to the second stage of appellate review. The Court concludes by stating, "The temple of criminal justice does not have three stories for the affluent and only two for the indigent." *Mitchell* v. *Warden*, supra, Op. p. 7.

II.

A HOLDING THAT INDIGENTS ARE ENTITLED TO THE ASSISTANCE OF COUNSEL AT EVERY STAGE OF APPELLATE REVIEW WOULD NOT CREATE AN INTOLERABLE BURDEN UPON THE STATES.

The final question dealt with by the Court in *Mitchell* was the practical problem of whether institutional limitations compel a different result. The Sixth Circuit quoted from Justice Burger's concurring opinion in *Argersinger*, in which he stated that,

"the holding of the Court today may well add large burdens on a profession already overtaxed, but the dynamics of the profession have a way of rising to the burden placed on it." 407 U.S. at 44.

The Sixth Circuit of Appeals then concluded that, compared to *Argersinger*, the workload necessary to prepare petitions for leave to appeal or petitions for certiorari in a case already briefed below would be insignificant. The Court then noted that there is now a Michigan Appellate Defender office established which has the wherewithal to file such petitions and is in fact doing so, so that the problem created in the case at bar may soon cease to be a problem for Michigan.

Today there are 16 states that enjoy statewide defender systems. In addition, Wisconsin, Michigan, Oregon, Minnesota, and Illinois have established statewide appellate defender organizations, designed exclusively to process indigent appeals. Finally, even in those remaining states that do not provide organized defender appellate services to their citizenry on a statewide basis, the great majority of urban counties provide defender systems which include appellate capability. In all, although in 1961 only 3% of the nation's counties boasted an organized defender office, today over 64% of America's population is served by defender agencies. See *"The Other Face of Justice"*, Report of the National Defender Survey, NLADA, 1973.

Secondly, the provision of counsel for discretionary appeals will actually operate to ease the burden on the courts. The Director of the Administrative Office of the U.S. Courts has reported that during the decade from 1960 to 1970 prisoner petitions increased by 635 percent. These "tissue paper" petitions are filed by inmates who are without the

assistance of counsel to screen out meritorious claims. It has been the experience of those defender agencies which handle appeals and post-conviction matters that, once the credibility of the defender is established, far fewer appeals are filed by inmates who have been informed that their claims are frivolous. (See unpublished report of NLADA Evaluation of Minnesota Defender System (1973); Report to the California Council on Criminal Justice on the Solano County Inmate Assistance Program (1972).)

III.

POLICY CONSIDERATIONS.

A. National Standards Require the Appointment of Counsel for the Indigent at Every Stage of the Appellate Process.

The National Advisory Commission on Criminal Justice Standards and Goals has recently recommended, that,

> "Public representation should be made available to eligible defendants in all criminal cases . . . The representation should continue during trial court proceedings and through the exhaustion of all avenues of relief from conviction." Standard 13.1, Task Force Report on the Courts, 1973.

Similarly, standards of the National Legal Aid and Defender Association adopted in 1965 provide that,

> "Every defender system should provide representation . . . at every stage in the proceeding including appeal . . . to remedy error or injustice." Handbook of Standards for Legal Aid and Defender Offices, NLADA, 1965.

Finally, the American Bar Association *Standards Relating to Providing Defense Services* call for the provision of counsel,

"at every stage of the proceedings, including sentencing, appeal, and post-conviction review." Standard 5.2, Duration of Representation, ABA Project on Minimum Standards of Criminal Justice (Approved Draft, 1968).

B. Appointment of Counsel at Every Stage of the Appellate Process Is Required in the Federal System.

These nationally-approved standards all agree that, under our American system of justice, whatever avenues of relief are deemed necessary for the protection of the rich person should be made available to the poor person as well.

The federal system frequently reflects the most modern thinking in the criminal law area and its statutes may well serve as models for the states (e.g., the Federal Bail Reform Act of 1966 has been followed in a number of states). The Criminal Justice Act of 1964, as amended in 1970, provides in pertinent part,

> "If a person for whom counsel is appointed under this section appeals to an appellate court or petitions for a writ of certiorari, he may do so without pre-payment of fees and costs or security therefor and without pre-payment of fees and costs or security therefor and without filing the affidavit required by section 1915(a) of title 28." (18 U.S.C. Sec. 3006A (6)).

It further provides,

> "A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate or the court through appeal, including ancillary matters." (18 U.S.C. 3006A(c)).

As Justice Douglas noted in his concurrence in *Doherty* v. *United States*, 404 U.S. 28 (1971),

> "Rule 44 and the Criminal Justice Act each establish a federal policy of providing every indigent federal accused with appointed counsel at every stage in his defense from arraignment through direct review by this Court, including petitioning for certiorari."

The proposition is urged that defendants in state courts should not be entitled to an inferior brand of justice.

C. A Reversal of the Decision Below Would Contract the Scope of Representation Presently Being Provided at the State Level.

Although the existence of State Appellate Defender programs can alleviate the difficulties in providing counsel for subsequent appeals, these very programs have in some cases been directed not to proceed to file subsequent appeals on behalf of their clients. The granting of certiorari in the case at bar has added impetus to this movement. For example, in a letter to the State Appellate Defender of Wisconsin concerning the case of *LaVerne Day* v. *State of Wisconsin*, which was filed in the U.S. Supreme Court, File No. 73-6279, the Wisconsin Supreme Court has advised the State Appellate Defender that if certiorari is granted, he may not continue as counsel for the defense. Moreover, the Wisconsin Court advised that no further petitions for certiorari to the U.S. Supreme Court may be filed by that office unless specifically authorized by the Wisconsin Supreme Court.

Thus, we have come full circle back to the situation in *Douglas* v. *California*, supra. The procedure complained about in that case was an attempt by the California reviewing courts to determine prior to appointment of counsel which cases were meritorious. That procedure was struck

down in *Douglas*, and ought not to be spawned here. The decision of the Fourth Circuit in *Ross* v. *Moffit* should be upheld. To yield to the interpretation desired by appellant would result in the cutback of funds to state appellate defender agencies already existing, and a reduction in that precious commodity, equal justice for the poor.

Respectfully submitted,

NATIONAL LEGAL AID AND
DEFENDER ASSOCIATION
By MARSHALL J. HARTMAN
By NANCY E. GOLDBERG
By JAMES F. FLUG

March 22, 1974